Filed 2/17/05 Walzem v. DaimlerChryslter CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THOMAS WALZEM et al.,

Plaintiffs and Respondents,

v.

DAIMLERCHRYSLER CORPORATION,

Defendant and Appellant.

F044150

(Super. Ct. No. 01CECG02139)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. James L. Quashnick, Judge.

Lewis Brisbois Bisgaard & Smith, Jon D. Universal and Claudia J. Robinson for Defendant and Appellant.

William M. Krieg & Associates, William M. Krieg and Kimberly L. Mayhew for Plaintiffs and Respondents.

-ooOoo-

In 1995 plaintiffs Thomas and Lisa Walzem purchased a 1996 Plymouth Grand Voyager manufactured by defendant DaimlerChrysler. In 2001 they filed suit alleging that the car was a "lemon" and asserted a cause of action pursuant to the Song-Beverly Consumer Warranty Act (the Song-Beverly Act). (Civ. Code, § 1790 et seq.)[1] The jury found that the car suffered from a nonconformity covered by the express warranty that substantially impaired the car's use, value, or safety. Defendant appeals, contending substantial evidence does not support the jury's findings. We will affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On May 17, 1995, the Walzems purchased a new 1996 Plymouth Grand Voyager. The car was covered by a three-year or 36,000-mile limited warranty, whichever occurred first.

On June 11, 1996, with 15,068 miles on the odometer, the car was brought to the service department of the local dealership, Fresno Chrysler Plymouth, with the complaint that when slowing to come to a stop the vehicle would "cut out." The dealer was unable to duplicate and confirm the complaint, and the vehicle did not register a diagnostic fault code for the problem. The dealer recommended cleaning the throttle body of dirt ingested through the induction system, which service is considered maintenance not covered by the warranty.

On September 8, 1995, the manufacturer issued a bulletin informing local dealerships of a problem with 1996 Grand Voyagers built before August 1995. The bulletin stated that the vehicle "idles rough, sags on acceleration, or hesitates, occurring shortly after the fuel tank is completely filled." The recommendation was that the fuel tanks in these vehicles be replaced with a "revised fuel tank." The repair records show

---

[1] All further statutory references are to the Civil Code unless otherwise specified.

that the repairs pursuant to the recall were made on the Walzems' car on January 16, 1996.

On September 5, 1996, with mileage of 19,392, the Walzems again brought the vehicle to the dealer with the complaint that it stalled. The diagnostic tests disclosed no problems and the dealer was unable to duplicate the problem, but the dealer replaced the body computer.

According to the Walzems, they returned the vehicle to the dealer for the stalling problem on May 21, 1997, with mileage of 29,153.

The Walzems took the vehicle to the dealer for stalling on September 17, 1997, with 34,521 miles. The service department was unable to duplicate and verify the problem and the diagnostic codes did not disclose any problem. Again, the throttle body was cleaned.

The Walzems next brought the vehicle in for the stalling problem on July 24, 1998, after the warranty had expired. The odometer showed 45,537 miles. The service department could not confirm any problem with the vehicle. After performing an airflow test, the dealer recommended an induction service for the fuel system.

The Walzems returned the vehicle to the service department with the complaint that the stalling problem had recurred in September 1998, with mileage at 48,047. The service department could not duplicate the problem, the diagnostic codes did not disclose a problem, and no repairs were made.

The Walzems brought the vehicle in for servicing on February 18, May 17, and May 27, 1999, but made no report of the stalling problem on any of these visits. On May 27, 1999, the mileage on the vehicle was 60,351.

On September 20, 1999, the Walzems brought the vehicle in again for servicing with the complaint that it stalled. At that time, the mileage on the vehicle was 66,926. The service department was unable to duplicate and verify the problem. At the end of this visit, the dealer installed a special data recorder, or copilot, on the vehicle. The

copilot is installed on the dash and records data whenever a problem occurs with the vehicle. The co-pilot did not sense any problems with the operation of the vehicle and therefore no data was recorded.

On November 8, 1999, with 68,358 miles on the vehicle, the dealer reinstalled the copilot. The copilot remained on the vehicle for at least two weeks, during which time the device detected no problems in the operation of the vehicle.

On or about November 22, 1999, the Walzems notified the manufacturer of an "unidentifiable electrical or other problem" with the vehicle. The letter stated that the Walzems would be pursuing remedies under the "California Lemon Law" and that they had contacted a local attorney.

The Walzems, however, returned the vehicle to the dealership on February 17, 2000, complaining of the stalling problem. The odometer showed 71,322 miles. Again, the dealer could not verify the problem and the diagnostic codes did not disclose a problem. The technician posited that a broken thermostat could have caused the problem.

On June 8, 2000, the Walzems took the vehicle to the dealer for the stalling problem. The mileage at this time was 75,704. Again, the dealer could find no problem with the operation of the vehicle.

On August 2, 2001, at 88,861 miles, the Walzems brought the vehicle in for servicing, complaining that it stalled. Again, the diagnostic codes did not disclose any problem, the vehicle passed an air flow test, and the technician could not verify the complaint.

There were five repair visits to the dealership after August 2001, but no stalling problem was reported on any of those visits.

The Walzems did not have records documenting that regular maintenance, such as changing air filters, was performed.

Lisa Walzem testified that the stalling problem might not occur for a few months, but then would happen once or twice in one month. She did use the vehicle on a daily

basis, including driving it to the courthouse during the trial. At the time of trial, the car had approximately 104,000 miles on the odometer.

Steven D. Koehler testified as an expert witness on behalf of the Walzems. Koehler had the vehicle on two separate occasions, drove it for a number of days, used a copilot device during that time, but never experienced any stalling out. Although Koehler was asked to inspect the car for evidence of major problems, the Walzems did not ask him to determine the nature of the stalling problem. Koehler acknowledged that poor fuel or oils, a dirty throttle body, failure to perform regular maintenance, and the manner in which a car is operated can affect the drivability of the car.

Russell Ash, the service manager for the local dealer, also testified. He stated that the throttle body needed to be cleaned frequently in this vehicle, which is not uncommon in the Central Valley because of its dirty air. Cleaning of the throttle body is a maintenance function. The service department found no fault codes for a stalling out problem, and Ash indicated that the dealership would not simply "throw parts" at a vehicle because that would result in an unnecessary expense for the customer and could be considered fraud.

Portions of the deposition of Brian Bozsum, the former service manager at the dealership, were read to the jury. Bozsum stated that a copilot was installed on the vehicle for over a month, with no problems being revealed. Both Bozsum and another employee each drove the vehicle for over 50 miles but never encountered a stalling problem. Bozsum also stated that if a car's air filter is not replaced at regular intervals, it could cause the car to "quit." There was no evidence that the Walzems did not replace the air filter as needed.

Roy H. Edmark testified as an expert witness for the defense. Edmark is a retired technical advisor for Chrysler Corporation. He inspected and tested the vehicle, including driving it for over 100 miles. He was unable to verify any stalling conditions and no fault codes were revealed. Edmark testified that a stall could be induced by "two-

footed" driving with a dirty throttle body on the car. There was no evidence that the Walzems drove the vehicle in this manner or did not properly maintain the vehicle.

The Walzems filed their complaint on June 21, 2001. The jury found that the stalling out problem constituted a nonconformity covered by the express warranty, which substantially impaired the use, value, or safety of the vehicle and that DaimlerChrysler was unable to repair the problem after a reasonable number of attempts. By stipulation of the parties, the issue of damages was reserved for the trial court. The trial court fixed total damages at $23,101.84.

DISCUSSION

DaimlerChrysler contends the evidence is insufficient to establish that (1) the Walzems' car suffered from a nonconformity covered by the express warranty, and (2) the nonconformity substantially impaired the car's use, value, or safety.

I. Standard of Review

We review the sufficiency of the evidentiary basis for the jury's verdict pursuant to the familiar substantial evidence test. (*Romo v. Ford Motor Co.* (2002) 99 Cal.App.4th 1115, 1137.) Accordingly, we view the whole record in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. (*Id.* at pp. 1137-1138.) We determine whether the record "discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could" make the findings in question. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

II. Substantial Evidence

The Song-Beverly Act requires a manufacturer who gives an express warranty on a new motor vehicle to service or repair that vehicle to conform to the warranty. (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 134.) If the manufacturer is unable to do so, the purchaser may seek replacement or restitution. (§ 1793.2, subd.

(d)(2).) The Song-Beverly Act does not apply to any defect or nonconformity caused by unauthorized or unreasonable use of the vehicle. (§ 1794.3.)

The jury found that the Walzems' car had a nonconforming defect, covered by the express warranty, which substantially impaired the use, value, or safety of the vehicle. The nonconforming defect identified by the jury was the stalling out.

DaimlerChrysler contends that the Walzems failed to prove that the stalling out was the result of a nonconforming defect, as opposed to one of the other causative factors that would not bring into play the Song-Beverly Act. DaimlerChrysler argues that the Walzems failed to meet their burden of proof on this issue and the judgment must therefore be reversed. DaimlerChrysler also claims the use, value, or safety of the vehicle was not impaired, as indicated by the Walzems driving the vehicle for seven years and over 100,000 miles.

Nonconforming Defect

DaimlerChrysler argues that the Walzems cannot meet their burden of proving the existence of a nonconforming defect because the only evidence of the nonconforming defect is the testimony of the Walzems, and neither the dealer nor any of the experts who testified at trial were able to duplicate and verify the stalling out defect. DaimlerChrysler's argument, however, goes to the weight of the evidence, not the sufficiency.

The trier of fact reasonably may rely on the testimony of a single witness, unless the testimony is physically impossible or patently false. (Evid. Code, § 411; *People v. Cudjo* (1993) 6 Cal.4th 585, 608.) To warrant the rejection of the statements given by a witness who has been believed by a jury "there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions." Conflicts and even testimony subject to justifiable suspicion do not justify the reversal of a judgment "for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a

determination depends." (*People v. Franz* (2001) 88 Cal.App.4th 1426, 1447.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) Reversal on this ground is unwarranted unless "'upon no hypothesis whatever is there sufficient substantial evidence to support [the verdict].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

The evidence presented at trial established that the Walzems brought the vehicle to the dealer complaining of stalling out at least seven times before seeking restitution and at least three more times before filing suit. While there was evidence presented at trial that a stalling out problem could be caused by a lack of regular maintenance, as well as a nonconforming defect, there is nothing in the recommendations on the repair documentation to indicate that the vehicle was not receiving routine maintenance or that such maintenance would resolve the stalling out problem.

Obviously, with respect to the testimony regarding the stalling out, the jury believed the Walzems. Their testimony regarding the stalling out is not subject to a claim of physical impossibility, nor is it patently false. DaimlerChrysler admits that a nonconforming defect is one reason a vehicle may stall out. Further, because the service and repair file does not include any documentation indicating that the vehicle was not receiving routine maintenance, or that lack of such maintenance could cause the stalling out problem, a reasonable jury could reject the contention that the problem was the result of any unreasonable or unauthorized use. (*Jensen v. BMW of North America, Inc., supra,* 35 Cal.App.4th at p. 136.)

Further, we disagree with DaimlerChrysler's assertion that the nonconformity is one which common experience cannot adequately address. Just as it is within the realm of common knowledge that a new car with an irremediable oil leak does not conform to its warranty, it is also within the realm of common knowledge that a new car that

intermittently stalls out while being driven does not conform to its warranty. (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102.)

There is nothing in the testimony of the Walzems or the evidence presented regarding the stalling out that warrants rejection of the testimony and reversal of the jury's verdict. (*People v. Franz, supra,* 88 Cal.App.4th at p. 1447.)

Impairment of Use, Value, or Safety

DaimlerChrysler next contends that even if a nonconforming defect were present in the vehicle, it did not substantially impair the use, value, or safety of the vehicle, as indicated by the Walzems driving the vehicle for seven years and over 100,000 miles.

Whether a nonconformity is substantial is determined by an objective test based on what a reasonable person would understand to be a defect. (*Lundy v. Ford Motor Co.* (2001) 87 Cal.App.4th 472, 478.) The test is applied, however, to the circumstances of the specific buyer. (*Ibid.*) The issue of whether a nonconformity is substantial is a question of fact. (*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1250.)

Thomas Walzem testified to his reluctance to use the vehicle on out-of-town trips and that he would sometimes rent a car for use on such trips. He also testified that because of his reluctance to pass along a defective vehicle to another buyer, he was unable to sell the vehicle and obtain a replacement. Lisa Walzem's letter to DaimlerChrysler expressed concern that she would not be able always to restart the car in time to avoid an accident.

The Walzem vehicle was returned to the dealer numerous times over a period of several years in an attempt to have the defect corrected. Despite the defect, the Walzems continued to use the vehicle. This continued use, however, does not preclude a finding that the defect substantially impaired the use, value, or safety of the vehicle.

In *Jensen*, the buyer had taken the car in for repair six times over a period of three years and continued to use the car during this period. These actions did not prevent

the buyer from recovering damages. (*Jensen v. BMW of North America, Inc., supra,* 35 Cal.App.4th at p. 136.)

Also, the safety of a vehicle with a stalling out problem is substantially impaired. Stalling while on the roadway constitutes a dangerous condition. (*Schreidel v. American Honda Motor Co., supra,* 34 Cal.App.4th at p. 1250; *Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 883.)

We conclude that a reasonable person would view intermittent stalling out as a substantial defect in a vehicle. (*Lundy v. Ford Motor Co., supra,* 87 Cal.App.4th at p. 478.) Based upon the testimony of the Walzems, a reasonable jury could find that the use and safety of the vehicle was substantially impaired. (*Ibid.*)

Conclusion

Even though the evidence could support contrary findings by the jury, we are required to resolve all issues of credibility and conflicts in support of the verdict. (*People v. Autry, supra,* 37 Cal.App.4th at p. 358.) After application of this rule, the record evidence is sufficient to support the jury's findings.

DISPOSITION

The judgment is affirmed. The Walzems shall recover their costs.

_____
CORNELL, J.

WE CONCUR:

_____
BUCKLEY, Acting P.J.

_____
GOMES, J.